

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII
3
4 UNITED STATES OF AMERICA,) CRIMINAL NO. 22-00048JMS-WRP
5 Plaintiff,) Honolulu, Hawaii
6 vs.) April 27, 2023
7))
8 (1) KEITH MITSUYOSHI KANESHIRO,) DEFENDANT SHERI J. TANAKA'S
9 (2) DENNIS KUNIYUKI MITSUNAGA,) MOTION TO DISMISS COUNT 2
10 (3) TERRI ANN OTANI,) OF THE FIRST SUPERSEDING
11 (4) AARON SHUNICHI FUJII,) INDICTMENT
12 (5) CHAD MICHAEL MCDONALD,) DEFENDANT NUMBERS ONE
13 (6) SHERI JEAN TANAKA,) THROUGH FIVE NOTICE OF
14) JOINDER
15))
16 Defendants.)
17 _____))

18 TRANSCRIPT OF PROCEEDINGS
19 BEFORE THE HONORABLE J. MICHAEL SEABRIGHT
20 UNITED STATES DISTRICT JUDGE

21 APPEARANCES:

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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 THURSDAY, APRIL 27, 2023 10:01 A.M.

2 THE COURTROOM MANAGER: Criminal Number
3 22-00048JMS-WRP, United States of America versus Defendant --
4 versus Keith Mitsuyoshi Kaneshiro, et al.

5 This case has been called for a hearing on Defendant
6 Sheri J. Tanaka's Motion to Dismiss Count 2 of the First
7 Superseding Indictment and defendant numbers one through five
8 notice of joinder.

9 Counsel, please make your appearance for the record.

10 MR. CHIANG: Good morning, Your Honor. Andrew Chiang
11 and Michael Wheat appearing for the United States.

12 THE COURT: Yes.

13 MR. BERVAR: Good morning, Your Honor. Birney Bervar
14 for Keith Kaneshiro, who's present.

15 THE COURT: Yes, thank you.

16 MS. MARINO: Good morning, Your Honor. Nina Marino
17 for Mr. Mitsunaga. Also in the courtroom is John Schum.

18 THE COURT: Yes, I see him. Thank you.

19 MS. LUM: And good morning, Your Honor. Doris Lum on
20 behalf of Terri Ann Otani. With the Court's permission, we
21 request she appear via phone.

22 THE COURT: Right. Ms. Otani, can you hear us okay?

23 DEFENDANT OTANI: Yes, thank you.

24 MR. KENNEDY: Andrew Kennedy on behalf of Aaron Fujii.
25 Good morning, Your Honor.

1 THE COURT: Yes, good morning.

2 MR. OTAKE: Good morning, Your Honor. Thomas Otake on
3 behalf of Mr. Chad McDonald, who's present.

4 THE COURT: All right. Thank you.

5 MR. MERMELSTEIN: Good morning, Your Honor. Mark
6 Mermelstein present with Ms. Tanaka who is in court.
7 Mr. Cowan, my colleague, is -- with the Court's permission
8 would appear by telephone, and Ms. Glendon is in the gallery.

9 THE COURT: All right. Can you hear us, Mr. Cowan?

10 MR. COWAN: Yes, Your Honor. Good morning.

11 THE COURT: All right. Yes, thank you.

12 Okay. Please be seated, first of all. And secondly,
13 because we have people on the phone, they can only hear us
14 through the mic system. So if you're speaking, I really don't
15 mind if you stay seated, but if you stand it's probably best to
16 use the lectern because that way it will pick you up best.

17 So, Mr. Mermelstein, you file interesting motions and
18 let's have you start off with motion number two here.

19 MR. MERMELSTEIN: Thank you, Your Honor. I will go to
20 the podium.

21 Thank you, Your Honor. I think that with respect to
22 the issue of Count 2, the Section 241, the standard that the
23 court has -- Supreme Court has laid out is clear. Not only has
24 to be a right, it has to be a specific and definite right. And
25 that's laid out in abundant case law.

1 And when you look at the legislation and cases that
2 have interpreted, in the particular the ADEA, the word "right"
3 as used in that -- in Section 241, the right that the
4 government has put at issue here, the right to file a lawsuit,
5 is not a right within the meaning of Section 241.

6 THE COURT: And what's your best argument for that? I
7 mean you make several different arguments. Is it the *Kozminski*
8 case, is it the arbitration cases you cite? What do you see as
9 your best -- or is it just a combination of all of that?

10 MR. MERMELSTEIN: I think the *Kozminski* case lays out
11 the standard. That it has to be not only a right --

12 THE COURT: It can't be any right, it has to be made
13 specific by the express terms of the Constitution or laws or
14 cases interpreting them.

15 MR. MERMELSTEIN: Right. And then there's other Ninth
16 Circuit case law under *Reese* that the right must be, quote,
17 clearly delineated. So there's a variety of ways in which the
18 courts have articulated that there has to be a degree of
19 precision here. And I will say the word "right" has carried a
20 lot of meanings over the years and a lot of --

21 THE COURT: -- word jurisdiction, it's a word with a
22 lot of meanings.

23 MR. MERMELSTEIN: Yes.

24 THE COURT: Yeah.

25 MR. MERMELSTEIN: I'm reminded, my father, after I was

1 misbehaving and with respect to a car --

2 THE COURT: Just recently or a while ago?

3 MR. MERMELSTEIN: No, this is a couple years back.

4 THE COURT: Okay. Okay.

5 MR. MERMELSTEIN: And he told me, Son, driving my car
6 is -- is a privilege, not a right. And your privilege has been
7 suspended. Right? So, he had a view of -- a different view of
8 a right.

9 The issue here, and I don't mean to make light of the
10 situation because this is a significant situation here, we have
11 a system that is set up that when there's a clearly delineated
12 line, our system of criminal laws, you have a clearly
13 delineated line that a defendant clearly steps over. And that
14 is the hallmark of criminal law. And what we have here is
15 anything but a clearly delineated line when it comes to 241.

16 We have a statute that was passed 150 years ago that
17 was clearly targeted. The motivating factor for it was to
18 criminalize conduct related to a specific substantive right,
19 which was the right to vote. This was a statute that was
20 passed because the Ku Klux Klan was targeting --

21 THE COURT: I'm familiar with the case.

22 MR. MERMELSTEIN: Clearly -- and so it was clearly
23 motivated -- the motivating factor was the substantive right
24 and over the years it's only been enforced with respect to
25 substantive rights. And so the question then is, how is a

1 defendant on fair notice, how is this statute to put someone of
2 ordinary intelligence on fair notice, to bleed into the void
3 for vagueness, but it's essentially the same issue that -- that
4 there just is no guidance out there to suggest to someone that
5 a right includes what it seems to me is a judicial remedy.

6 THE COURT: But if we back up for a minute from the
7 specifics of the case, the vagueness as applied argument for a
8 minute, and just this issue you've raised as to the difference
9 between sort of a judicial, what do you call it, enforcement
10 right or judicial remedy versus the substantive right, right,
11 you draw that distinction. Can you have one without the other?
12 I mean that's where I have some issue.

13 MR. MERMELSTEIN: Of course. Of course.

14 THE COURT: Because the substantive right seems sort
15 of illusory if you don't have a right to come into court and
16 enforce that -- that substantive right.

17 MR. MERMELSTEIN: Well, talk to any of the folks who
18 were involved in *U.S. v. Bivens* case before *U.S. v. Bivens*
19 existed. There are plenty of rights without remedies. There
20 are plenty of situations where there is a right under law, but
21 there is no cause of action.

22 THE COURT: Right, but what I'm saying is if there is
23 a substantive right, if Congress clearly -- you admit that the
24 substantive right afforded by ADEA and Title VII would qualify
25 under 241?

1 MR. MERMELSTEIN: Yes.

2 THE COURT: Okay. Okay. I guess what I'm saying is,
3 help me with the area I'm struggling a little bit, which is if
4 you take away the right for someone to come into court, you're
5 taking away the substantive right because how do you enforce
6 it.

7 MR. MERMELSTEIN: I guess what I'm -- what I'm saying
8 is, if there was conduct that was -- that infringed on
9 someone's substantive right to be free from discrimination, to
10 be free from age discrimination, to be free from gender
11 discrimination, then that would be enforceable under 241. But
12 to say that the right in 241 is the right to file a lawsuit,
13 that is a bridge too far.

14 THE COURT: But you could keep someone from ever
15 realizing their substantive rights by keeping them from filing
16 a lawsuit, because absent a lawsuit you can't enforce those
17 substantive rights. Right? So that's the question I have.
18 Are they sufficiently inextricably intertwined or inextricably
19 linked that you can't make the argument or not, that's the way
20 I'm looking --

21 MR. MERMELSTEIN: Well, I think the issue manifests in
22 this case because there is no allegation that Ms. Tanaka did
23 anything to interfere with -- to interfere with her right,
24 Ms. Mau's right to be free from age discrimination. She was
25 not her employer, she was not -- she did not -- she's not

1 alleged to have done anything. I mean we had a civil trial
2 here with respect to whether --

3 THE COURT: By the way, before you go on, I want to
4 disclose something I found out recently. I don't think it
5 matters, but just like I did with my sister-in-law, I believe
6 my brother-in-law was a juror on that case. I assume no one
7 cares about that, but I didn't want that -- I wanted that out
8 there. He told me he was a juror and I went back and looked
9 because I remember it was a long time ago and I remember it was
10 Judge Watson. So I looked and I believe -- he's now divorced
11 from my sister-in-law, it's my wife's sister's ex-husband that
12 was on the jury. If anyone has a problem with that, please let
13 me know at some point in time. I can't imagine anyone would
14 call jurors in that case as a witness or anything in this case.
15 But it's just one of those weird circumstances. I thought I
16 would just let everyone know.

17 MR. MERMELSTEIN: I expect there may be evidence with
18 respect to what happened in that trial, but I don't think
19 it'll -- it would come from the transcripts or whatnot, it
20 would not come from juror testimony.

21 THE COURT: Right.

22 MR. MERMELSTEIN: I think one of the issues here, Your
23 Honor, is that Ms. Mau did push forward on her argument that
24 she was discriminated against and the jury found against her.
25 The jury found that she was not discriminated against. Her

1 claim was -- was non-suited or denied. And so it's a curious
2 thing where you have a series of folks that are accused of
3 doing something to infringe on someone's right and even as you
4 say if it's kind of derivative of the substantive right to be
5 free from -- free from discrimination, when a jury has already
6 found that she was not -- that that substantive right was not
7 denied, she -- she was not discriminated against.

8 The other point I would make is that when you look at
9 it from the perspective of you have the Supreme Court weigh in
10 and drawing a very sharp distinction between the substantive
11 rights and the judicial remedies, and making clear that --

12 THE COURT: You're talking the arbitration, *14 Penn*
13 *Plaza* cases.

14 MR. MERMELSTEIN: The whole -- that whole line of --
15 the whole line of cases with respect to a series of
16 different --

17 THE COURT: So help me with the relevance of those
18 cases because it seems to me what those cases say, essentially
19 are you can waive your right to have a judicial forum and
20 that's not a waiver of your substantive right, essentially, to
21 do that.

22 MR. MERMELSTEIN: I don't read it as them recognizing
23 that the right to a judicial forum is a substantive right that
24 can be waived. That's the government's argument.

25 THE COURT: Well, no, I don't -- that may be so, but

1 I'm just trying to understand why it's helpful to you. I'm not
2 sure the cases are that helpful to the government. I'm not
3 sure they're helpful to me is my point because I think what
4 those cases say -- and tell me if I'm wrong, if you believe I'm
5 wrong -- what those cases stand for is through, for instance, a
6 collective bargaining agreement, you can waive your right, and
7 there's always a lot of tension, often tension in the law
8 between some rights and collective bargaining rights, but here
9 that you can waive your right to have a judicial forum for a
10 Title VII or ADEA claim and instead have that arbitrated and
11 that doesn't deprive you of your -- of your sort of substantive
12 rights.

13 And so to me it's just sort of saying you can waive
14 that. And you could waive a jury trial. I mean you could
15 waive something that clearly is one of the most fundamental
16 rights in the Constitution and there's no problem with that.
17 So --

18 MR. MERMELSTEIN: But it's the reason, Your Honor.

19 THE COURT: -- I'm not seeing the nexus between --

20 MR. MERMELSTEIN: The reasoning behind those cases --
21 I'm sorry to talk over you.

22 THE COURT: No, no.

23 MR. MERMELSTEIN: The reasoning behind that whole line
24 of cases is that -- there is a non-waiver provision that
25 backstops this. That's what starts the whole dialogue is there

1 is a non-waiver provision. And so the question is, which
2 rights, notwithstanding the non-waiver provision, which rights
3 can you still waive. And what the court has said, the Supreme
4 Court has said is that it's only substantive rights that --
5 that can be -- that -- it's only substantive rights that are --
6 are in the non-waiver provision. Meaning that --

7 THE COURT: You can waive your right to the forum
8 essentially, right? Arbitration versus a court.

9 MR. MERMELSTEIN: I think -- I think what the court is
10 doing is it's drawing a sharp distinction and it's identifying
11 what are the rights under the ADEA, and it's saying that the --
12 and I'm going to use the word "different" than "right" because
13 if we use "right" for everything it's hard to differentiate --
14 but it's saying that the remedy is not a substantive right
15 under the ADEA. It's --

16 THE COURT: I don't have a problem with -- I don't
17 have a huge problem saying a right to sue is not a substantive
18 right, because it's not, it's a procedural right. The question
19 is you're giving two different labels and you're automatically
20 saying, And once you have those two different labels a judicial
21 remedy doesn't work, you know, it's not a right. I'm just not
22 so sure that's true. I'm not saying you're wrong, I'm just
23 saying you can't just create the labels and say one fits and
24 one doesn't fit.

25 MR. MERMELSTEIN: Of course. Of course. But the

1 question is, once you understand that there are two different
2 things, embedded within this word "right" there are two
3 different things, substantive rights and something else,
4 whether we call them judicial remedies, call them procedural
5 rights, something --

6 THE COURT: Well, how about if we call it a right to
7 sue that you can waive?

8 MR. MERMELSTEIN: I think --

9 THE COURT: Because that is what the EEOC letter calls
10 it.

11 MR. MERMELSTEIN: That is what the EEOC letter, for
12 sure. But when the Supreme Court is addressing this issue and
13 the Supreme Court is looking at the ADEA, and the Supreme Court
14 has a right to sue letter in front of it, it is still saying
15 that even though it's a right to sue, that's still something
16 that is not a non-waivable right for purposes of the ADEA
17 because it's not one of the substantive rights that the ADEA is
18 protecting.

19 THE COURT: Do you think you could go into a
20 workplace -- I don't know, you're your own partner, I think,
21 but if you went to work for a firm and you weren't, you know,
22 your own boss essentially, do you think they could have a
23 contract with you that says you waive your right to bring any
24 sort of Title VII claim by arbitration, in court, anywhere?

25 MR. MERMELSTEIN: I'm not an employment lawyer.

1 THE COURT: No, no, but kind of, you know, gets to
2 this question, right? You know, can you outright in an
3 employment contract, collective bargaining agreement, whatever
4 it may be, just say, I give it up. I'm giving up any ability,
5 let's call it --

6 MR. MERMELSTEIN: Okay.

7 THE COURT: -- to file suit or arbitration or any
8 other sort of remedy under Title VII, ADEA, ADA, whatever the
9 case may be. I mean I don't know the answer to that, but I
10 suspect the answer is no, you couldn't do that.

11 MR. MERMELSTEIN: Well, I think the question is
12 whether it's knowing and --

13 THE COURT: Yeah, but say it's knowing. You sign off
14 on it. You're a lawyer, you sign off on it.

15 MR. MERMELSTEIN: Well, I think the answer is that if
16 it falls within the certain rights that are non-waivable, then
17 you cannot. If it doesn't fall within the rights that are
18 non-waivable --

19 THE COURT: I mean I'm pretty sure the Ninth Circuit
20 at least would say that's a policy, you know, you can't do
21 that, you can't contract away that right. Pretty confident of
22 that.

23 MR. MERMELSTEIN: But the point is that those
24 non-waivable rights are in fact the substantive rights that the
25 statute is protecting. So there's this -- that's what the

1 Supreme Court is saying when it says there are certain
2 non-waivable rights, those are the substantive rights that the
3 statute is protecting. What we're dealing with here today is
4 something else. It's not in those non-waivable rights, it's
5 not in those substantive rights that the statute is protecting.

6 THE COURT: Okay. Let's move on to the vagueness.
7 And I think what I'll do again is I'll break this up into the
8 sort of 241 argument on the judicial remedy versus the
9 substantive rights and the Fourth Amendment separately, we'll
10 argue those.

11 But on the vague -- and let me say something maybe
12 neither of you are prepared to hear me say on this, but I'm not
13 so sure that if I deny your motion, the first part of the
14 motion you just argued, if I grant it, the mootness -- I'm
15 sorry, the vagueness becomes moot. But if I deny it, then I
16 don't have to wait for trial. I see a number of cases where
17 this comes up in a Rule 29 setting, and there are cases that
18 say this is really so fact intensive that for an as-applied
19 challenge you should wait. And so, you know, I don't know if
20 that's something you agree with, disagree with, I don't know if
21 it's something you've thought about at all. But I'm sort of
22 leaning towards that direction that if I deny the first part of
23 your motion I would say that you would have to wait and
24 everyone who joined would have to wait for the actual evidence
25 for me to make a determination.

1 MR. MERMELSTEIN: That's helpful framing for the
2 argument.

3 On the void for vagueness, I think the issue is
4 whether the defendant is on fair notice, defendant of ordinary
5 intelligence is on fair notice that the conduct at issue is
6 prohibited by the statute. Not just prohibited generally or
7 not just criminal generally but prohibited by the statute.

8 And when you look at the statute itself, you look at
9 the fact that the Supreme Court has said that this is not a
10 right that falls within the non-waivable provision. So all
11 that, that arbitration line of cases, that all has said that
12 the right to sue is not one of those non-waivable substantive
13 rights.

14 You look at 150 years of enforcement history where
15 we've never seen a case like this. I will also layer on top of
16 that, last time we were in court we were talking a lot about
17 1983 claims. Well, 1983 claims use slightly different
18 phraseology, but it's the only things that are actionable are
19 rights, privileges, and immunities that are protected under
20 federal law, and it has to be a clearly established right as
21 opposed to specific and delineated. But there's a lot of
22 parallels.

23 You also -- you go through the history of 1983 claims.
24 We also do not see, I haven't seen, government certainly hasn't
25 referenced any instances where the right to sue under the --

1 any right to sue, whether it's under the ADA, employment
2 discrimination, is a right that is protected under federal law
3 for purposes of 1983. That statute too has been around for a
4 very long time, reconstruction era statute passed specifically
5 related to protecting certain civil rights.

6 So we have enforcement history for 150 years, a couple
7 different statutes, and no indication that this -- that the
8 word "right" in the statute could be used to criminalize the
9 conduct at issue.

10 And so what's the government's response? Government's
11 response is everybody knows that bribery is criminal and
12 everybody knows that bribery is wrong. So there's no issue
13 here. The problem with that argument is that when you look at
14 the elements of 241, it doesn't actually require any of the
15 oppressive conduct or injurious conduct to be corrupt, to be
16 bribery laden. All it says is you have to engage in certain
17 conduct that is -- constitutes injury or oppression and that it
18 interferes with someone's rights.

19 And so if you take the bribery for a moment out of
20 this, and you just say, Hey, these are folks, my client was
21 hired to do a criminal referral, right? And she diligently
22 walked evidence over to the Prosecutor's Office and diligently
23 exercised that duty. The fear is that the jury convicts based
24 on some showing less than the bribery, less than the specific
25 quid pro quo that would need to be presented for a Count 1

1 conviction, for Count 1. And so --

2 THE COURT: I understand the argument. I really do.
3 I'm just -- you're almost reinforcing that, I think, I sort of
4 need to wait and hear what the actual evidence is to make the
5 decision. And I don't know ultimately I agree with you or
6 disagree with you, but, you know, to see exactly how that
7 evidence plays out.

8 MR. MERMELSTEIN: I guess the -- I guess the question
9 then is how -- how -- I'm not sure the -- so we have evidence
10 that the government presents, but I'm not sure how this picture
11 becomes clearer at the end of the prosecution's case.

12 THE COURT: I think it's always clear. I mean
13 otherwise we'd do Rule 29s now and we'd have summary judgment
14 motions in, you know, criminal cases, but we don't. You know,
15 we wait for the evidence and then when the government rests,
16 you know, everyone on this side can make your Rule 29 motions
17 on various matters, and the Ninth Circuit has, I believe, you
18 know, taken up this very issue in the context of a Rule 29
19 motion, that is a void for vagueness challenge that is made in
20 a 29 motion and then it's brought up on appeal when denied.

21 And, you know, I understand I'm throwing this -- this
22 is sort of out of left field, this -- this -- because none of
23 you briefed this or had a discussion as to whether or not it
24 might be appropriate to wait. So, I don't expect you to have
25 done the research, Mr. Mermelstein.

1 MR. MERMELSTEIN: Yeah, no, I think that --

2 THE COURT: I don't mean to put you, you know, on the
3 spot here. But, you know, I mean there's always surprises at
4 trial, as you know. You've done a number of trials. You know
5 there's always things that come up and it's like, Wow, I didn't
6 expect that. We don't know what might happen. We have a sense
7 of what the evidence will be I suspect but --

8 MR. MERMELSTEIN: Well, I think the -- I guess I
9 would -- and I guess I don't disagree that we would have more
10 information, there's always going to be more information later
11 on.

12 THE COURT: Right.

13 MR. MERMELSTEIN: But if what we're assessing at this
14 point is whether a defendant would be on fair notice that this
15 conduct would violate 241, the government has a sort of slight
16 of hand where they say obviously a defendant would know this
17 conduct is criminal, but that's not the standard. The standard
18 is whether the defendant would know that this conduct violates
19 the particular statute that we're talking about. That's the
20 void for vagueness analysis.

21 And it seems to me that there is sufficient evidence
22 before you at this point to say that no defendant of ordinary
23 intelligence, given the history here, given that this fact --

24 THE COURT: Let me ask you one more question. I found
25 some cases, and this was all new to me because I've never seen

1 these types of cases before, where there are very technical
2 regulatory requirements. Maybe a requirement if you and I read
3 it we'd be a little bit lost on what it means for, you know, an
4 engineering something or who knows what. And I saw some cases
5 where the courts say, Well, it's not void for vagueness for
6 that engineer that was on trial because he understood all of
7 that. Whereas, the ordinary person may not, but that engineer
8 would understand. I can't remember if it was an engineer, but
9 something of that sort.

10 How does that play in with a lawyer here? Is there a
11 difference there or -- and if so, how does it shake out?

12 MR. MERMELSTEIN: I don't think so, Your Honor. I
13 think that the evidence, I'll proffer some evidence that will
14 ultimately come out. At the time -- this was Ms. Tanaka's
15 first foray into the criminal litigation world at all. She was
16 a very junior lawyer to begin with when -- at the time. This
17 was the first time she had, I think in federal -- I guess the
18 federal court was the civil -- the civil proceeding. And so
19 even if those cases stand for the proposition that Ms. Tanaka
20 is -- is more intelligent than your average criminal defendant
21 or more knowledgeable with respect to --

22 THE COURT: Yeah, I would never say lawyers are more
23 intelligent than other people. That's probably not something
24 we want to say. More knowledgeable in the law.

25 MR. MERMELSTEIN: I don't think that that speaks at

1 all to the issue of interpreting Section 241. Because unless
2 the government's going to point to -- I mean in law school, I
3 confess I've been doing this 25 years, I'd never looked at 241
4 as a -- as a statute, and I've been in this world for a long
5 time.

6 So even if, you know, Ms. Tanaka has a law degree, the
7 idea that she's subject to at all a heightened standard because
8 of that, I -- I just don't see how you would get there from an
9 evidentiary point of view.

10 THE COURT: Well, and maybe it's the opposite. Maybe
11 she's a lawyer and so you expect her to throw hard punches in
12 cases and do things. That's what lawyers do. I don't know how
13 it plays out.

14 MR. MERMELSTEIN: Well, I guess what I would say is,
15 if you look at -- you could say that she's a lawyer familiar
16 with 150 years of enforcement history and the complete lack of
17 any case that's ever been brought under 241 --

18 THE COURT: Then you get into fiction though, right,
19 because, you know --

20 MR. MERMELSTEIN: Well, it's all -- it's all a
21 hypothetical situation because we're talking about the person
22 of ordinary intelligence, right? We're talking about the
23 hypothetical reasonable man standard. And that's why I think
24 it becomes problematic to get into that.

25 THE COURT: Let's do this, let me have you stop now.

1 Let me see if anyone wants to add anything on your side. I'll
2 hear from Mr. Chiang on this issue and then we'll come back to
3 the Fourth Amendment. Okay? Thank you.

4 Mr. Bervar?

5 MR. BERVAR: Nothing to add.

6 THE COURT: Ms. Marino.

7 MS. MARINO: You know, if the Court will indulge me
8 for a second.

9 THE COURT: Sure.

10 MS. MARINO: Thank you. I appreciate that. You know,
11 I really struggle with this. I've obviously never seen a
12 charge for 241 either. It's very unusual. But, you know, the
13 way I look at it, Your Honor, is there's the right to exercise
14 freely your constitutional rights, one of which would be to not
15 be discriminated against, for example. And then there's -- and
16 then there's this issue of, well, if you want to enforce that
17 right, does that now create a whole new right. That's the way
18 I look at it. And maybe that's wrong.

19 THE COURT: No, I understand what you're saying and
20 I'm not saying it's not an interesting and difficult issue. I
21 guess, you know, what I'm struggling with is, how you enforce a
22 substantive right without the right to come into court and do
23 so. And, you know, I'm sitting as a judge, right, where these
24 things happen and somebody could be discriminated against left
25 and right, but if they don't have an ability to come into

1 court, what's it mean?

2 MS. MARINO: You know, what the Court said before
3 really got me thinking about that, what you just said now.
4 When you posed the question, Your Honor, to Mr. Mermelstein and
5 you said -- I forgot what you said, but his answer is I'm not a
6 labor lawyer --

7 THE COURT: I think the question was whether he could
8 just contract away totally his right to bring a Title VII.

9 MS. MARINO: That's right. And so I think the answer
10 to that question is, I think you could sign a waiver that says
11 I give up my right to not be discriminated against. Because
12 you have a right to not be discriminated. But again, I think
13 that that's the distinction. That's where the right is, that's
14 where the right is that's contemplated by 241, not the right to
15 enforce that right.

16 It's like -- they just -- they have to be separate
17 because otherwise 241 would read differently. 241 would then
18 say, You have the right to be free from, blah, blah, blah,
19 discrimination, and if that's violated, you have the right to
20 sue because of that. I mean I just don't think it goes there.

21 THE COURT: Well, it does talk in context, I forget
22 the language, enjoyment of the right, right? And so how do you
23 enjoy the right without bringing a case in court. That's the
24 counter-argument, right? It does sort of include something
25 beyond just the right in the language itself.

1 MS. MARINO: I don't think it -- I don't think it
2 contemplates enforcement. I think it -- by its very language
3 it doesn't contemplate enforcement. It contemplates the right
4 of enjoyment. It doesn't contemplate, and, and if you don't
5 get to have that, then you can do something to enforce it.
6 That's not what 241 says. I'm not saying that someone couldn't
7 draft or redraft 241 to say that, but as we all sit here today
8 in this courtroom that is just not what it says.

9 THE COURT: Okay. Thank you.

10 MS. MARINO: Thank you.

11 THE COURT: Okay. Ms. Lum?

12 MS. LUM: Nothing further, Your Honor.

13 MR. KENNEDY: I have nothing further, Your Honor.

14 MR. OTAKE: Nothing to add. Thank you.

15 THE COURT: Okay.

16 MR. CHIANG: I just want to start with first
17 principles and look at what the language of 241 --

18 THE COURT: I read it. You don't need to start with
19 the language.

20 MR. CHIANG: Okay. So then I would just say this:
21 You know, my friend Mr. Mermelstein has talked at length
22 about --

23 THE COURT: Are you really friends?

24 MR. CHIANG: It's a term of endearment.

25 THE COURT: All right. I just -- yeah.

1 MR. CHIANG: I'm sure we could be friends if we --

2 THE COURT: Yeah, probably.

3 MR. CHIANG: He's emphasized the 150-year enforcement
4 history, but I, you know, I think that in the 150 years that
5 this statute has been in existence, the meaning of the word
6 "right" has not changed. It still means a power or privilege
7 that is conferred by law. And the right to file a lawsuit
8 under Title VII and ADEA is plainly a right or privilege that
9 is conferred by the law. And the only way that the defendants
10 can say that this right is not subsumed under the 241 statute
11 is to somehow exclude this procedural right, this right to a
12 judicial forum from this extremely broad language of 241. And
13 I don't think that they have presented anything persuasive in
14 order to do that.

15 You know, courts that have interpreted 241 have said
16 that this is an extremely broad right. The United States
17 Supreme Court in *Price* said that the language in 241 is plain
18 and unlimited. It includes, you know, every right, any right
19 that is --

20 THE COURT: Yeah, but the Supreme Court has limited
21 it, right? In, what is it, *Kozminski*?

22 MR. CHIANG: Well, in *Kozminski* they said that it has
23 to be a specific right.

24 THE COURT: Right, either by the express terms of the
25 Constitution or the law or decisions interpreting the

1 Constitution or laws.

2 MR. CHIANG: That's right. And, you know, we will
3 candidly say that we have not found an interpretive decision
4 that says that, you know, the right to file a lawsuit is a
5 right specifically, but if you look at the statute itself, it's
6 made specific under the statute, under Title VII and ADEA.

7 THE COURT: How much weight do I give the fact that,
8 you know, 150 years here we are for the first time having this
9 discussion, apparently in the nation, how do I -- how do I
10 weigh that?

11 MR. CHIANG: I don't think you give any weight to it,
12 Your Honor, and I think the reason is that the statute's
13 enforcement history is not one of the tools of statutory
14 interpretation that this Court uses. And, you know, candidly
15 we're happy that in 150 years we have not seen a group of
16 people allegedly conspire in order to retaliate against a
17 person's right to file a lawsuit.

18 But I think that there is a first time for everything.
19 And when we see facts that squarely meet the contours of the
20 words of a statute, then we have to -- we have to charge it,
21 and this is what we did in this case.

22 I don't think that --

23 THE COURT: You don't have to charge it, but you're
24 saying you can charge it.

25 MR. CHIANG: We can charge it and we --

1 THE COURT: And it's not you, it's the grand jury, but
2 go ahead.

3 MR. CHIANG: Yes. And the grand jury has returned an
4 indictment.

5 So, I don't think the Court should -- should look at
6 the enforcement history. I think the Court should look at the
7 text, the structure and the purpose of statute.

8 And, you know, I think that the defendants really have
9 not presented anything to demonstrate to the Court that a right
10 to file a lawsuit falls out of 241. I think they have to sort
11 of reach to these cases in the arbitration context in order to
12 try to say, Well, you know, in the arbitration context at least
13 the Supreme Court has made this distinction between a right to
14 file a lawsuit which can be waived and a substantive right
15 which cannot be waived. But this distinction really only
16 matters in the question that was presented to the Supreme Court
17 at that time, which is can you waive your right to a federal
18 judicial forum in order to litigate substantive rights under
19 the discrimination statutes. And the Supreme Court said, Yes,
20 you can waive it. But that doesn't make a right that is waived
21 any less of a right. It's still a right. You can just waive
22 it.

23 And so I don't think those cases help them much at
24 all. And, you know, I think, again, we really just urge the
25 Court to stick to the ordinary principles of statutory

1 interpretation in this case. And I'm happy to answer the
2 Court's questions if you have any.

3 THE COURT: All right. Thank you.

4 All right, Mr. Mermelstein, I'll give you just a
5 minute or so on that if you wish, but I really do want to turn
6 to the Fourth Amendment because we've been going about
7 40 minutes here.

8 MR. MERMELSTEIN: Thank you, Your Honor. Just very
9 briefly in response. The very fact that we're here debating
10 this issue speaks to the uncertainty here. Right? The
11 government says that it's our burden, the defense burden to
12 prove to Your Honor that this is something that wasn't
13 contemplated. I don't see it that way at all. The government
14 has charged a crime here. To me it's the government's burden
15 to establish that they have actually charged a crime and that
16 the defendant is on fair notice of a crime.

17 THE COURT: Okay. I understand those arguments.
18 Let's move to the Fourth Amendment.

19 MR. MERMELSTEIN: On the Fourth Amendment, Your Honor,
20 we did have -- we had -- it was a bit of a procedurally tricky
21 situation because we had filed this motion before we heard
22 arguments on the prior motion. And I understand the Court's --
23 the Court's prior rulings and I don't intend to revisit that
24 issue.

25 I do think it would be helpful to have some clarity on

1 what is the seizure that we're talking about here because --

2 THE COURT: Well, let me ask you this: So, you know,
3 I think I fell a little short of making a absolute ruling as to
4 what a seizure was and wasn't in my oral ruling. But how much
5 of that is a question for the jury? That's part of why I'm
6 being careful here. How much of that might be a question for
7 the jury as opposed to me making a legal determination and
8 telling the jury that?

9 Like, you know, we're in trial and at the end of the
10 trial we start talking about jury instructions. Does the jury
11 make a determination? Do I give them an instruction as to what
12 a seizure generally is and some outlines to it and then they
13 make that decision, or is that a purely legal decision that I
14 make in the course of the trial?

15 MR. MERMELSTEIN: I think there's a threshold legal
16 determination that the Court needs to make whether certain
17 facts could constitute a seizure if the jury then found they
18 were. So the Court is kind of the gatekeeper here.

19 THE COURT: Right, and I found already that it could
20 be a seizure, right? Using your language, using your verb, in
21 the context of the initial conditions of release, we'll call
22 it. Not the personal recognizance, right?

23 MR. MERMELSTEIN: Right.

24 THE COURT: The bail, the travel restriction.

25 MR. MERMELSTEIN: But those were out of statute. So I

1 thought that where we left things was that the -- where the
2 rubber meets the road here is that the only --

3 THE COURT: Oh, out of statute of limitations you
4 mean?

5 MR. MERMELSTEIN: Yes, sorry for the imprecision.

6 THE COURT: Yeah.

7 MR. MERMELSTEIN: I thought where we left things was
8 that we've sort of heard articulations of three different
9 buckets of seizure, if you will. The initial bail conditions
10 that are out of statute of limitations, the release on their --
11 on her own recognizance, and then the prosecution generally as
12 sort of three different --

13 THE COURT: And where the prosecution might lead.

14 MR. MERMELSTEIN: Right. And I had understood that
15 the import of the Court's initial thoughts --

16 THE COURT: Yeah.

17 MR. MERMELSTEIN: -- were that the initial restraints
18 could conceivably be a seizure, but that they were out of
19 statute of limitations.

20 THE COURT: Correct.

21 MR. MERMELSTEIN: And so it would be inappropriate for
22 the government to argue those were the seizures at issue here.

23 THE COURT: For purposes of the statute of
24 limitations.

25 MR. MERMELSTEIN: Right, because it would -- right,

1 they would have to prove up some other seizure within the
2 statute.

3 THE COURT: Right.

4 MR. MERMELSTEIN: I had also understood that the
5 subsequent bail conditions, the OR release would not be
6 considered a seizure.

7 THE COURT: That was my view at least, right.

8 MR. MERMELSTEIN: And that what is essentially left is
9 payment for a prosecution and if the prosecution could
10 eventually lead to a seizure.

11 THE COURT: Right.

12 MR. MERMELSTEIN: My understanding is essentially
13 that's what we're trying.

14 THE COURT: I think that's right. That's where I am
15 as well as far as -- I mean I reread it this morning and that's
16 what I think I said.

17 MR. MERMELSTEIN: Okay. And I mean I can offer more
18 thoughts on that, but I think Your Honor has largely indicated
19 that that -- whether --

20 THE COURT: But those lines I've drawn for purposes of
21 the motion. You know, where do those lines then fit in with
22 the jury I guess is part of what I'm -- I'm not certain of the
23 answer to that.

24 MR. MERMELSTEIN: Well, I would think that that leaves
25 us with the government is permitted to argue the payment for

1 prosecution and the seizure that might ultimately follow from
2 that, that that's the seizure that's fair game here. And if
3 the jury ultimately concludes that when in 2012 when an
4 agreement was struck, allegedly, that folks were contemplating
5 a situation many years down the road where a prosecution could
6 come about and that ultimately notwithstanding a judicial
7 review of the evidence and a jury review of the evidence, if
8 that ultimately led to a conviction, then that could lead to a
9 seizure. You and I disagreed as to whether the judicial
10 involvement would be an intervening factor that would
11 essentially moot any unreasonable seizure. We disagreed, I --
12 I understand that, but I think that's the issue as --

13 THE COURT: Okay. So where does that leave us with
14 your motion now then I guess. Let me cut into the chase. You
15 know, for the present motion, now that you have the benefit of
16 what I've said before and you know my thought process.

17 MR. MERMELSTEIN: Right.

18 THE COURT: Where do you believe that leaves us?

19 MR. MERMELSTEIN: The -- the one other issue I think
20 that is ripe for determination at this point is the government
21 doesn't allege in their complaint -- in the indictments that
22 the -- they allege that there was an undefined seizure, but
23 they don't allege anything with respect to probable cause. And
24 I think that what is required is an allegation that the seizure
25 was done unreasonably, that is without probable cause. And I

1 think that's the ultimate issue that --

2 THE COURT: So have you looked at this case I found, I
3 don't know if you've seen it, *United States versus S-E-A-S-E,*
4 *Sease*, 659 F.3d 519, a Sixth Circuit case from 2011. And let
5 me just give you the facts as I understand them in this case,
6 which is a police officer, he was an acting police officer,
7 staged drug buys, and for the purpose of then stealing the
8 drugs and the money, right. So it wasn't like it went into the
9 police station and the evidence room and so forth. It was just
10 a illegal effort to line the police officer, I don't know if
11 there's more than one, pocket. And ultimately were convicted
12 under both 241 and 242. And he argued, that is the defendant
13 in that case, that there was insufficient evidence to support
14 the conviction because he didn't violate the rights of the
15 participants because there was probable cause. And the Sixth
16 Circuit kind of like blew that off and said, Well, that may be
17 true, and although the exclusionary rule usually is based on
18 sort of objective standards and not subjective, right, and
19 Fourth Amendment typically is with very few exception, that
20 that's not really relevant in this case where the whole reason
21 for the conduct or what the police did was illegal to start
22 with.

23 And so, yeah, they say there was probable cause. Of
24 course there was. These people had drugs and that's the whole
25 reason the thing was set up, but it doesn't sort of act as a

1 superseding cause or however you might look at it.

2 So that's one case I found. I didn't find -- and some
3 district court cases as well including the one I told you about
4 an immigration officer who charged somebody, I can't remember
5 the exact, but because she wouldn't have sex with him or
6 something of that sort.

7 MR. MERMELSTEIN: Yeah, I did -- I did look into the
8 other case, I think it was a Southern District of Texas case
9 that you referenced last time with respect to an immigration
10 officer who was essentially arrested an illegal immigrant for
11 the purpose of sexual interest and raped her. And I think Your
12 Honor's conclusion was that, well, whether she was
13 appropriately arrested or not, whether there was probable cause
14 to arrest her or not wasn't really the point. Respectfully I
15 read that case differently.

16 THE COURT: Okay.

17 MR. MERMELSTEIN: The seizure that I think they were
18 talking about in that case was not the arrest, it was the rape.
19 The case describes at length how rape is the ultimate form of a
20 seizure and the ultimate deprivation of someone's rights. And
21 so --

22 THE COURT: Well, that may be true, but we still have
23 the Sixth Circuit case that seems sort of on point.

24 MR. MERMELSTEIN: Well, I confess I have not read the
25 Sixth Circuit case and we may -- we may be discussing this one

1 again.

2 THE COURT: Right.

3 MR. MERMELSTEIN: But it -- I guess then it's hard for
4 me to -- if probable cause is not part of the equation, then I
5 guess I don't understand exactly how this would work with
6 respect to someone in Ms. Tanaka's shoes who is presenting the
7 evidence to the prosecutor and let's say she has a good faith
8 belief that there was probable cause for -- for the referral,
9 for the criminal referral. So she would be -- she would not --
10 she could have the specific intent to have -- have Ms. Mau
11 deprived of her rights, but because she believes there is a
12 lawful basis to have Ms. Mau deprived of her rights, she in
13 good faith believes -- she believes there is probable cause.

14 THE COURT: I'm not going to rule now because it
15 sounds like, you know, something we may be talking about later
16 if she testifies and this comes out this way, but, you know,
17 you may be then able to argue she didn't have the specific
18 intent necessary to violate the statute. I don't know where
19 that leads you as far as an argument goes. But what I'm saying
20 is, for the argument that you're making that if there's
21 probable cause and a finding of probable cause that wipes the
22 slate clean is something I'm not willing to accept.

23 MR. MERMELSTEIN: No, and I understand that, Your
24 Honor, but I think the issue of probable cause and the issue
25 of -- I see the Fourth Amendment, I -- my understanding is that

1 when the Fourth Amendment uses the word "unreasonable,"
2 unreasonable search and seizure, that except for something like
3 Terry stops where you're talking about reasonable suspicion,
4 except for that situation, I can't think of any -- anywhere
5 where unreasonable means anything different than without
6 probable cause.

7 And so it seems to me that what we're talking about
8 here is the government proving up that this was -- that these
9 folks intended a seizure that was without probable cause.

10 THE COURT: Yeah, and I'm just saying based on my
11 reading of the law right now I reject that and probably will
12 reject it when it comes time for jury instructions.

13 MR. MERMELSTEIN: Okay.

14 THE COURT: Okay. So I'm not sure what that does,
15 again, to your motion. And, you know, obviously if I feel that
16 way, then it seems to me you have a hard time on this motion,
17 right?

18 MR. MERMELSTEIN: I don't disagree with that
19 conclusion, Your Honor.

20 THE COURT: Okay. Okay. All right.

21 MR. MERMELSTEIN: I think that's --

22 THE COURT: Okay. All right. Thank you. All right.
23 So let me just go back around the room.

24 MR. BERVAR: Nothing to add.

25 MS. MARINO: No, thank you, Your Honor.

1 MS. LUM: No, Your Honor.

2 MR. KENNEDY: Nothing to add, Your Honor.

3 MR. OTAKE: Nothing to add.

4 THE COURT: All right.

5 MR. CHIANG: Your Honor, we accept your view that
6 probable cause doesn't wipe the slate clean. So --

7 THE COURT: Thank you.

8 MR. CHIANG: -- that's not something that -- you know,
9 that's not something that we're going to argue against.

10 The only point I do want to make, though, just to
11 respond to Mr. Mermelstein is that even despite that, we do
12 allege in the indictment that there was not probable cause. I
13 think if you -- if you look at the introductory allegations,
14 I'm not going to belabor them, I think that it's fairly clear,
15 including the allegation that, you know, Judge Nakasone
16 eventually dismissed the case with prejudice because there was
17 no probable cause, I think we've alleged that.

18 And so I think the next question, I don't know if the
19 Court wants to get into it, is the matter of, you know, what
20 questions are for the jury and what questions are legal rulings
21 for the Court. And I think the Court had indicated certain
22 legal perspectives from the previous hearing that we accept as
23 well. We're not going to --

24 THE COURT: Well, it didn't necessarily sound like you
25 accepted it in your opposition. I'm glad to hear you do now.

1 MR. CHIANG: Well, so, if I can make that clear. I
2 understood the Court to say that, you know, release on a
3 person's own recognizance and travel restrictions did not
4 amount to a seizure. And we accept that. We also heard the
5 Court to say, well, you know, if there was a cash bail, 20,000
6 cash bail, that that would be a seizure. We accept that as
7 well.

8 We understand that the cash bail was removed prior to
9 the statute of limitations. Our position only is that
10 regardless of what specific seizure the victim here was
11 actually exposed to, it's a jury question to decide whether or
12 not the defendants had -- still had the plan to subject her to
13 certain escalating seizures within the statute of limitations.

14 THE COURT: No, I understand that's a jury question.

15 MR. CHIANG: Yeah.

16 THE COURT: And if you're not going to argue or try to
17 argue that the personal recognizance, own recognizance period
18 was a seizure --

19 MR. CHIANG: We're not going to argue that.

20 THE COURT: -- maybe and the jury being told that's
21 not a seizure, you know, so that the lines are very clear and
22 there's no confusion.

23 MR. CHIANG: Right.

24 THE COURT: Those of you that have tried cases before
25 me, I mean heard me say this many times, with jury instructions

1 I really focus on making sure the jury understands what I'm
2 telling them.

3 MR. CHIANG: Right.

4 THE COURT: You know, really work hard on that because
5 jury instructions can be so difficult to follow, right? So I
6 work really hard on fidelity to the law but also so the jury
7 can understand it, and I don't want to be in a position where
8 they don't even know what we're talking about, right? Are we
9 talking way back here, are we talking about own recognizance,
10 are we talking about what might happen in the future.

11 MR. CHIANG: Right.

12 THE COURT: So that's just something to keep in mind.

13 MR. CHIANG: Right. Right. But I think that, you
14 know, and if this is something that we can discuss as we get
15 further down in the proceedings, but I think we should be able
16 to present evidence to the jury as to whether or not the
17 defendants still intended to subject the victim here to bail
18 conditions, even stricter seizures such as a detention, and
19 ultimately incarceration within the statute of limitations.

20 THE COURT: All right. Okay. Thank you.

21 MR. CHIANG: Thank you.

22 THE COURT: You can just from there if you have
23 anything, Mr. Mermelstein.

24 MR. MERMELSTEIN: No, Your Honor.

25 THE COURT: All right. So we're all together. Is

1 there anything else -- I'll take this under advisement and put
2 out a written order. Is there anything else though that you
3 folks want to talk about while we're all together? Let me
4 start with the prosecution side. I'll just call out names so
5 that we're --

6 MR. CHIANG: No, nothing further from the United
7 States. Thank you very much.

8 THE COURT: Mr. Bervar?

9 MR. BERVAR: No, Your Honor.

10 THE COURT: Ms. Marino?

11 MS. MARINO: Not on behalf of Mr. Mitsunaga.

12 THE COURT: All right. Thank you. Ms. Lum?

13 MS. LUM: No, Your Honor.

14 THE COURT: Mr. Kennedy?

15 MR. KENNEDY: No thank you, Your Honor.

16 THE COURT: Mr. Otake?

17 MR. OTAKE: No, Your Honor.

18 THE COURT: Mr. Mermelstein?

19 MR. MERMELSTEIN: No again, Your Honor.

20 THE COURT: All right. Very good. Okay. All right.
21 So, let me do this, let me have a -- are you okay if we come to
22 sidebar and have an off-the-record discussion for just a moment
23 about what's going to happen next?

24 MS. MARINO: Yes.

25 THE COURT: With you and Mr. Schum?

1 MS. MARINO: Yes, of course.

2 THE COURT: Okay. Why don't we do that. So I'm going
3 to recess this and have a separate hearing just with Mr. Schum
4 and Ms. Marino and potentially Mr. Mitsunaga for a minute.

5 Okay. So, Mr. Schum, Ms. Marino, if you can come over
6 here.

7 (The proceedings concluded at 10:57 a.m., April 27,
8 2023.)

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1 COURT REPORTER'S CERTIFICATE

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3 I, CYNTHIA FAZIO, Official Court Reporter, United
4 States District Court, District of Hawaii, do hereby certify
5 that pursuant to 28 U.S.C. §753 the foregoing pages is a
6 complete, true, and correct transcript of the stenographically
7 reported proceedings held in the above-entitled matter and that
8 the transcript page format is in conformance with the
9 regulations of the Judicial Conference of the United States.

10

DATED at Honolulu, Hawaii, May 29, 2023.

11

12

13 /s/ Cynthia Fazio
14 CYNTHIA FAZIO, RMR, CRR, CRC

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